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No. _____

In The

Supreme Court of the United States

October Term, 1993

Tom Metzger, John Metzger, and
White Aryan Resistance,

Petitioners,

v.

Engedaw Berhanu, Personal Representative
of the Estate of Mulugeta Seraw, Deceased,

Respondent.

**Petition For A Writ Of Certiorari
To The Court Of Appeals
Of The State Of Oregon**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Curtis Publishing Co. v. Butts*, 388 U. S. 130 (1967) this Court held that a party to litigation can only be shown to have waived that person's First Amendment rights in circumstances which show such a waiver by "clear and compelling" evidence.

The question presented herein is whether the Court of Appeals of the State of Oregon properly found the Petitioners to have waived any defense based upon their First Amendment rights to the claims made against them by the Respondent despite the fact that there is no evidence in the record of this case that any of the Petitioners knowingly, intelligently and voluntarily waived their First Amendment rights and defenses and regardless of the circumstance that the Petitioners, who were proceeding without the benefit of counsel, did continuously move to dismiss the action at issue on constitutional grounds.

LIST OF PARTIES

Tom Metzger
John Metzger

White Aryan Resistance, an Unincorporated Association, and It's Members, Agents, Servants, Employees and Assigns

Engedaw Berhanu, Personal Representative of the Estate of Mulugeta Seraw, Deceased

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PETITION FOR WRIT OF CERTIORARI

The Petitioners Tom Metzger, John Metzger and the unincorporated association of White Aryan Resistance, pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the State of Oregon, entered in the above styled proceeding on April 14, 1993. That court denied a timely filed motion for reconsideration on September 1, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of Oregon has been both officially and unofficially reported in the case of *Engedaw Berhanu, Personal Representative of the Estate of Mulugeta Seraw, Deceased, Respondent v. Tom Metzger, individually and as President of White Aryan Resistance, an unincorporated association; John Metzger, Appellants, and Kenneth Mieske and Kyle Brewster, Defendants*, 119 Or. App. 175, 850 P. 2d 373 (Or. App. 1993)

This opinion is reprinted in the Appendix hereto, page one (1) of the Appendix, infra. Neither Kenneth Mieske nor Kyle Brewster were parties to the appeal in the Court of Appeals and they are not parties to this Petition for a Writ of Certiorari.

The order of that court dated September 1, 1993 denying reconsideration is reprinted in the Appendix, page 8 of the Appendix, infra.

The order of the Supreme Court of the State of Oregon dated November 16, 1993 denying the Petitioners' petition for review in that court is reprinted in the Appendix hereto, page 10, of the Appendix, infra.

JURISDICTION

Engedaw Berhanu, Representative of the Estate of Mulugeta Seraw, Deceased, filed a civil action in the Circuit Court of the State of Oregon for the County of Multnomah against the Petitioners herein on or about April 4, 1990 pursuant to Oregon's wrongful death statute, § 30.020 of Oregon's Revised Statutes. The Petitioners

filed their first answer to the Respondent's initial complaint on or about December 30, 1989 wherein they denied all of the averments of said complaint and specifically alleged in their *Fourth Affirmative Defense To All Causes of Action* that "The actions of these answering defendants is protected action (sic) under the United States Constitution and the Constitution of the State of Oregon". Later in an answer to the Respondent's amended complaint which was filed by the Petitioners Tom Metzger, John Metzger and White Aryan Resistance, they again denied the material allegations of that pleading and again invoked their constitutional rights in that answer in their *Fifth Affirmative Defense To All Causes of Action*. The answer to the amended complaint was filed in the Multnomah County circuit court on or about April 27, 1990.

After the discovery process in this case had been completed and after the disposition of various pretrial motions, this case duly went to trial in Multnomah County circuit court. After proceedings which lasted for several days the trial jury returned a verdict for the Respondent in the amount of $475,469.00 in economic damages and two million dollars in non-economic damages. These damages were apportioned against the Petitioners herein and several other defendants but each of the defendants to the lawsuit was to be held jointly and severally liable for the payment of this portion of the judgment. In addition punitive damages were assessed by the verdict against each of the Petitioners as follows: Tom Metzger, five million dollars, John Metzger, one million dollars and White Aryan Resistance, three million dollars.

The verdict was duly made the judgment of the trial court and after that court disposed of various post-trial motions, the Petitioners appealed this judgment to the Court of Appeals of the State of Oregon, the appellate court having primary jurisdiction over this matter. That court affirmed the judgment of the trial court on April 14, 1993. It denied a timely filed petition for reconsideration on September 1, 1993. The Supreme Court of the State of Oregon denied a timely filed petition for review of the decision of the court of appeals on November 16, 1993.

On February 3, 1994, Justice Sandra Day O'Connor ordered that the time for filing this petition for a writ of certiorari be extended up to and including March 15, 1994.

The jurisdiction of this Court to review the judgment of the Court of Appeals of the State of Oregon is invoked under 28 USC § 1257 (a).

STATUTES INVOLVED

U. S. Constitution, Amendment One

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition government for a redress of grievances.

U. S. Constitution, Amendment Fourteen, Section One

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person

of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

The Petitioner Tom Metzger is a long-time political activist who has been and who continues to be an unabashed and outspoken advocate of white interests and racial separation in the United States and throughout the entire world. He makes no secret of his belief that what he perceives to be the growing influence and presence in the United States of such groups as Blacks, Hispanics and Jews, particularly since the end of the Second World War, has been detrimental to the interests of the traditionally European derived, White majority population of this country.

Tom Metzger has forcefully expressed these views on many occasions and through many mediums. He initially achieved a high degree of public awareness of his beliefs and the manner in which he commonly expresses them when he received the Democratic Party's nomination for an unsuccessful run at a congressional seat in his hometown of San Diego, California in 1980. Since that time he has expressed his views in various publications and formats and has received widespread attention on account of a public access television program that he has produced and hosted called "Race and Reason".

Mr. Metzger voices his positions in a frequently acerbic, caustic and many would say even crude manner. Undoubtedly many of his publications and utterances

could be reasonably understood as expressing encouragement and approval of unspecified acts of violence against unidentified members of the ethnic and religious groups previously mentioned.

Throughout the 1980's the Petitioner Tom Metzger, who was eventually joined in his efforts by his son, the Petitioner John Metzger, tirelessly evangelized and proselytized for his racial and political convictions in word and in print. By the middle of that decade he was directing an increasing amount of his attention to disaffected working class youths of Caucasian extraction, particularly those located in the areas of the nation where the nonwhite and non-Christian ethnic and religious population was rapidly increasing through immigration and natural increase. He and his son were especially interested in galvanizing what have come to be known as "skinhead" youths, young people who have adopted an idiosyncratic manner of appearance and dress in order to call attention to their non-mainstream political and racial views. The umbrella organization that he created to reach these groups is the Aryan Youth Movement, a sub-group of the Petitioner herein, the unicorporated association known as White Aryan Resistance.

In the fall of 1988 the Petitioner John Metzger mailed a letter to Kenneth Mieske to introduce the Aryan Youth Movement to Eastside White Pride, a White separatist youth group in Portland, Oregon, of which Mieske was a member. The letter further notified Mieske that associates of the Aryan Youth Movement, including Dave Mazzella, had relocated to the Portland area, and Mr. Mieske could contact them.

During the time that he was associated with the Eastside White Pride group Mazzella encouraged the members to be more forceful in their White separatist activism and, undoubtedly and unfortunately, he made comments and speeches to the group and the members thereof wherein he expressed encouragement and approval of acts of violence against unspecified members of minority groups. It should be noted, however, that his advocacy of violence was confined to puerile, adolescent forms of in-your-face hooliganism ("kicking ass, etc.") which commonly consisted of the use of derogatory racial epithets and of acts of what would be considered to be simple assault and battery directed toward members of the targeted groups. There is absolutely no evidence in the record which indicates that either he or the other Petitioners herein ever expressly directed any person to utilize lethal, deadly force against any identifiable member of the disliked ethnic and religious groups.

During the early morning hours of November 13, 1988 Kenneth Mieske and another member of Eastside White Pride, Kyle Brewster, became involved in a fight with Mulugeta Seraw, an Ethiopian who was then residing in Portland, and others. In the course of the fight Seraw was killed, apparently when Mieske hit him in the head with a baseball bat. Mazzella was in no way directly associated with this attack when it occurred and he had not even been in the company of the assailants during the several hours leading up to this incident.

The Portland law enforcement authorities thoroughly investigated this matter and in the course of so doing they searched Mieske's residence. During this search they discovered numerous papers and leaflets published and

distributed by the Petitioner White Aryan Resistance. They also found the letter from the Petitioner John Metzger to Mieske.

Mazzella's alleged association with the Petitioners and his putatively incendiary activities with the Portland organization were the linchpins of the lawsuit which the Respondent filed against the Petitioners. The lawsuit generally claimed that the Petitioners were legally responsible for the death of Mr. Seraw because they had sent Mazzella to direct and influence the actions of members of Eastside White Pride. Mazzella, in turn, had incited Mieske and Brewster by means of his violent and inflammatory rhetoric and comments to kill Seraw. The most elementary understanding of this Court's First Amendment jurisprudence renders this basis of liability against the Petitioners extremely problematic and deserving of intense and searching judicial examination. Nevertheless, it was a theory that the Respondent through his attorneys very successfully argued in the trial court as noted above.

Undoubtedly one extremely important reason why the Respondent achieved such a resounding victory was that through the use of a San Diego County Superior Court restraining order issued at his behest the Respondent was able to "freeze" all of the real property assets of the Petitioners (ostensibly to prevent a quitclaim transfer of the real property to Mrs. Metzger), which totalled between fifty and one hundred thousand dollars in such a manner that the Petitioners were unable to retain an attorney in the forum where they were tried so far from their homes. Thus the Petitioners were left to defend this lawsuit on an *in propria persona* basis with whatever meager legal knowledge and skills they could muster in the

exigency of this situation. The implications of the necessity on their part of representing themselves upon their ability to protect their fundamental rights, particularly their rights to freedom of speech and association under the First Amendment, were and are obvious.

Notwithstanding their lack of counsel, the Petitioners did at the earliest opportunity contest the legal basis of the Respondent's suit by invoking their constitutional rights. As noted above in their answers all of the Petitioners stated that their respective actions were "protected action under the United States Constitution and the Constitution of the State of Oregon." Moreover, the Petitioners specifically brought their constitutionally based defense to the attention of the trial court by means of a pretrial motion to dismiss, which was peremptorily denied without comment by the presiding judge. At the conclusion of the presentation of evidence, the Petitioners, through the action of Tom Metzger, moved to dismiss the Respondent's cause of action stating that "I would just make a motion to dismiss the entire case. They haven't proved it. They haven't proved their case. They certainly haven't proved intent."

It is true that the Petitioners, who were obviously unlearned in the fundamental precept of trial practice that an objection, and specifically the legal principle underlying an objection, normally has to be explicitly stated for it to be efficacious, did not make specific reference to the rights of freedom of speech and association embodied in the First Amendment in the vast majority of the pertinent objections and exceptions that they made throughout the trial. However, in *Defendant Tom Metzger's*

Objections to Plaintiff's Requested Jury Instructions, a written document filed with the trial court, he disputed the Respondent's proposed jury charge number 39 and in so doing made direct reference to the protection that should have been afforded to him by the free speech guarantee of the First Amendment. In a subpart explicitly headed "First Amendment", he averred that "Plaintiff dangerously misreads *N.A.A.C.P. v. Claiborne Hardware*. The last sentence of the instruction is wrong. Words alone may not be used to impose liability; they can only be used in conjuction (sic) with other acts."

Given the fact that the Oregon chapter of the American Civil Liberties Union also filed an *amicus curiae* brief disputing many fundamental aspects of the Respondent's cause of action on First Amendment grounds, the Petitioners certainly did enough to apprise the trial court judge, and any other reviewing tribunal in the state of Oregon, of the fundamental and basic issues of freedom of speech and freedom of association that were involved in this case. Only a judge who could have been totally ignorant of the law pertaining to this subject, a proposition which is contrary to the fundamental evidentiary precept that a judge is presumed to know the law, or jurists who were for reasons of their own consciously avoiding the obvious and clear implications of the First Amendment in this case, could fail to acknowledge this conclusion.

After the judgment at issue was rendered against them and upon their taking this appeal to the Court of Appeals of the State of Oregon, the Petitioners were far

more specific and precise in raising their First Amendment freedom of speech and freedom of association arguments. Significantly this was the first juncture in these proceedings when they had been able to obtain the assistance of competent and knowledgeable counsel in preparing and presenting their legal arguments. In their fourth assignment of error in their brief to the court of appeals they argued as follows:

> I. THE CALIFORNIA DEFENDANTS CANNOT CONSTITUTIONALLY BE HELD LIABLE FOR SERAW'S WRONGFUL DEATH BECAUSE THE RECORD REFLECTS NO CLEAR PROOF THAT THEY AUTHORIZED ANY AGENT TO INCITE OR ENGAGE IN VIOLENT ACTS AND BECAUSE THEIR PUTATIVE AGENT DID NOT IN FACT INCITE THE ACTIONS WHICH LED TO SERAW'S DEATH.
>
> A. Even assuming that they authorized Mazzella to incite or engage in violent action, the California Defendants cannot be held liable for Seraw's wrongful death because Mazzella did not, in fact, incite the actions which caused Seraw's death.
>
> B. The California Defendants cannot be held liable for Seraw's wrongful death because the record reflects no clear proof that they authorized Mazzella or any other agent to incite or engage in violent acts.

In support of their Fourth Assignment of Error, the Petitioners included in their brief encyclopedic discussion of First Amendment law as originally expounded and explicated by this Court in their attempt to show that they could not be held liable for Seraw's death in a

manner consistent with the basic jurisprudence concerning freedom of speech in the United States. This extended argument undergirded virtually every other contention of error that the Petitioners made in their appeal to the Oregon appellate court.

Yet despite the fact that First Amendment considerations obviously permeated, indeed virtually saturated, this case the Court of Appeals refused to consider the Petitioner's constitutional arguments because that body held that these arguments had not been properly raised in the trial court. "We conclude that defendants did not preserve any claim of constitutional error regarding the two theories of liability for intentional misconduct." *Berhanu v. Metzger* at page 4 of the Appendix, infra. That court went on to say that it would not review the Petitioners' constitutional arguments concerning the reckless appointment of an agent basis of liability because of the procedural default on their part in regard to the intentional misconduct claims.

The Oregon appellate court further stated that it would not even consider these issues under a "plain error" standard of review. Clearly that Court was grasping at any means to avoid any carefully considered review of the substantial and weighty First Amendment freedom of speech and freedom of association issues which were and are involved in this action. It is the failure of that Court to review these matters which is the crux of the Petitioners' request for a writ of certiorari which is addressed to this honorable Court.

REASONS FOR GRANTING THE WRIT

Without question the political, social and racial ideology of the Petitioners is held in the greatest disrepute and opprobrium of any viewpoint that is expressed in the public arena of ideas today. Moreover, these Petitioners have aired their controversial beliefs on occasion in a most abrasive and abusive manner. Clearly the preservation of a reasonable degree of social harmony is not a value in which they believe; in fact, they clearly seek to encourage and foment racial, religious and ethnic discord.

That fact notwithstanding, the protections of the First Amendment to the United States Constitution are not circumscribed by what the vast majority of people or even by what a resounding consensus of the community believes is good, decent and moral. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Board of Education v. Barnett*, 319 U.S. 624, 642 (1943). "(Speech) may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). "The First Amendment does not guarantee that other concepts virtually sacred to our nation as a whole – such as the principle that discrimination on the basis of race is odious and destructive – will go unquestioned in the marketplace of ideas." *Texas v. Johnson*, 491 U.S. 397, 418 (1989)

In accord with the broad and expansive protection that the Court has given to controversial speech, it has held that even the advocacy of unlawful, violent conduct is constitutionally protected so long as such speech does not amount to an incitement to imminent lawless action. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). The advocacy of such action at some indefinite and undesignated juncture in the future is neither criminally nor civilly actionable. *Hess v. Indiana*, 414 U.S. 105 (1973).

This Court has further held that it is not enough that a speaker's words may have a tendency to prompt the hearer to engage in illegal conduct; they must explicitly advocate such conduct before they can be punished in any manner. *Noto v. United States*, 367 U.S. 290 (1961). An individual's endorsement and approval of violent conduct is itself constitutionally protected speech so long as the speaker was not criminally involved in the incident at issue. *Rankin v. McPherson*, 483 U.S. 378 (1987). And even if the questioned speech could arguably amount to an otherwise actionable incitement, the party who is seeking to have it punished either civilly or criminally must show that the disputed words and actions in fact caused the harm which is sought to be redressed. *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

Insofar as actual proof of a culpable incitement to imminent lawless action in circumstances where First Amendment freedom of speech and association concerns are clearly implicated, this Court has held that a "solidity of evidence" must be apparent before a given utterance can be said to have crossed the threshold from protected speech to illegal conduct which can be proscribed and punished. *Landmark Communications, Inc. v. Virginia*, 435

U.S. 829, 845 (1978). In order to apprise the Court of the fact that there are very real and substantial issues in this case as to whether the conduct of the Petitioners could in any manner be determined to be an actionable incitement or incitements, they have included in the appendix to this petition excerpts of the cross-examination of Dave Mazzella by the Petitioner Tom Metzger. (Appendix at page 12, infra) Mazzella was undoubtedly the most important witness who testified against the Petitioners at trial.

The purpose of this petition is not, however, to request that this Court finally adjudicate this case in light of the fundamental and basic principles of the right of free.om of speech and association. The Petitioners know that in light of the purported procedural defaults relied upon by the Court of Appeals of the State of Oregon in disposing of their appeal before that tribunal, this Court would now be unable to proceed to decide this case on its merits. Rather it is meaningful, complete and plenary review of their defenses based upon the First Amendment guarantees of freedom of speech and association in the appropriate appellate forum which they seek to obtain from this Court.

A necessary concomitant to a party's right to protection under the First Amendment freedom of speech clause in a case of this kind is the right to effective and complete judicial review of a party's defenses and privileges arising out of the amendment. Such review will usually and frequently occur in an appellate court with jurisdiction over the subject matter of the action. In consideration of the basic and fundamental rights involved, a reviewing court is constrained to conduct a thorough and

searching examination of the record in order to make sure that vital freedom of speech interests have been upheld and preserved. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) and *Bose v. Consumers Union of the United States, Inc.*, 466 U.S. 485 (1984). Judicial review in order to vindicate these important rights is therefore part and parcel of the rights themselves. *Mooney v. Holohan*, 294 U.S. 103, 113 (1938).

The Court of Appeals of the State of Oregon totally dispensed with any careful consideration of the Petitioners' First Amendment rights in denying their appeal on the grounds that the Petitioners had failed to comply with that State's "contemporaneous objection rule" in perfecting and completing their constitutionally based objections and exceptions to the totality of the Respondent's case and to various important aspects of it such as the Respondent's proposed jury instructions. In deciding the Petitioners' appeal in this manner, the Court of Appeals fundamentally erred because this Court has squarely held that the right to meaningful judicial review in a case of this kind does not depend upon the technicalities and vagaries of a party's compliance with a state made and promulgated contemporaneous objection requirement. Of course, the contemporaneous objection rule allows a reviewing court to hold a party's objection or exception to be ineffective in order to invoke appellate review because such an objection or exception did not precisely state and explicate the party's grounds or rationale therefor. Thus the rule commonly allows otherwise valid claims of error to be forfeited on appeal due to the negligence or ignorance of the law of the party seeking

review of a disputed action on the part of the trial court or the opposing party.

In contrast, this Court has firmly and unequivocally held that First Amendment rights of freedom on speech and association can only be relinquished by means of a knowing, intelligent and voluntary waiver of such rights. Thus the responsibility of protecting a party's basic First Amendment rights is one of the very few obligations that this Court has principally imposed on the judiciary or other analogous authority, much as it has made it the trial courts' obligation to assure that every accused in a serious criminal case is represented by counsel. The presiding judge in a civil proceeding such as the one at bar is consequently obliged to affirmatively step in and protect these rights, in the absence of waiver, even if that party is only dimly aware of his rights in this regard or indeed is totally unaware of them.

> . . . the constitutional protection which Butts contends that Curtis has waived safeguards a freedom which is the "matrix, the indispensable condition, of nearly every other form of freedom". (cit) Where the ultimate effect of sustaining a claim of waiver might be an imposition on that valued freedom, we are unwilling to find waiver in circumstances which fall short of being clear and compelling.

Curtis Publishing Co. v. Butts, 388 U.S. 130, 145 (1967)

The rights to freedom of expression and association vouchsafed by the First Amendment stand on a plane of importance analogous and equivalent to that of the right to counsel for the accused in a criminal case guaranteed

by the Sixth Amendment to the United States Constitution. Both the right to freedom of speech and the right to counsel in a criminal case are predicate, foundational rights upon which the proper invocation of other rights necessarily depends. Consequently, it is entirely appropriate to apply the same criteria for determining when First Amendment rights have been properly relinquished as are usually and commonly invoked in deciding the issue of whether or not a criminal accused has properly waived his right to counsel.

> It has been pointed out that "courts indulge every reasonable presumption against waiver of fundamental constitutional rights" and that we "do not presume acquiescence in the loss of fundamental rights." A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused.

Johnson v. Zerbst, 304 U.S. 458, 464 (1938). See also *Edwards v. Arizona*, 451 U.S. 477, 482 (1981).

There is absolutely nothing in the record of this case that even remotely indicates that any of the Petitioners waived their First Amendment rights, specifically their right to exacting judicial review of the question of whether or not the Respondent's cause of action violated these rights.

> In the present case, however, there was no guilty plea, and the return to the writ does not allege an affirmative waiver. . . . Presuming

> waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandably rejected the offer. Anything less is not waiver.

Carnley v. Cochran, 369 U.S. 506, 516 (1962)

In fact, there is every indication in the record that the individual Petitioners fully intended to assert their rights rather than to waive them. As has been noted, the First Amendment aspects of this case permeated the entire trial and it is simply disingenuous to argue that the presiding judge was not made aware of them. Given the fact that Tom Metzger and John Metzger were laymen who had been compelled to represent themselves in a complicated legal procedure without the benefit of counsel, then surely it must be concluded that they did more than enough to apprise the trial court judge of the fact that there were weighty First Amendment issues to be considered by that jurist in making a final determination of their liability.

This Court has held that there is no necessity that a fundamental right be asserted in some specific, talismanic formula before the court, tribunal or other deliberative body before which it is invoked is required to take cognizance of the right before proceeding further. In *Emspak v. United States*, 349 U.S. 190 (1955) the petitioner therein had sought to invoke his right to be protected against compelled self-incrimination before the now defunct House Committee on Un-American Activities. In refusing to answer certain questions put to him by the committee,

he expressed his reliance on "primarily the First Amendment, supplemented by the Fifth".[1]

A lower federal appellate court, the United States Court of Appeals for the District of Columbia Circuit held that Emspak had failed to properly assert his self-incrimination right in that he had neglected to make an explicit and obvious reference to this right in refusing to answer queries put to him by the congressional committee. As a consequence that court held that he could be lawfully prosecuted for refusing to answer questions propounded to him by a congressional committee.

This Court disagreed with this decision by the appellate tribunal and ruled that Mr. Emspak had sufficiently invoked his right to be free from compelled self-incrimination in the circumstances in which the committee had sought to interrogate him. Thus the Court ruled that his less than precise and somewhat inexact assertion of this right was clearly sufficient to preclude a finding of waiver on his part.

> . . . no ritualistic formula or talismanic phrase is essential in order to invoke the privilege against self-incrimination. All that is necessary is an

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[1] The Fifth Amendment states that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

> objection stated in language that a committee may reasonably be expected to understand as an attempt to invoke the privilege. . . . (A)n objection that is sufficiently clear to reveal a probable intention to invoke the privilege cannot be ignored merely because it is not phrased in an orthodox manner. . . . (I)t should be noted that a committee is not obliged to either accept an ambiguous constitutional claim the very moment it is first presented. The way is always open for the committee to inquire into the nature of the claim before making the ruling . . . Although the privilege against self-incrimination must be claimed, when claimed it is guaranteed by the Constitution. Waiver of constitutional rights is not lightly to be inferred. A witness cannot be properly held after claim to have waived his privilege upon vague and uncertain evidence.

349 U.S. 194-196

The principle of law set forth and explicated in *Emspak* is, of course, fully applicable to the situation presented *sub judice*. As in *Emspak*, the Petitioners, who were unlearned in the technicalities of the law and trial procedure, attempted to inexactly and unartfully invoke and assert a fundamental right in their behalf. Like the appellate court in that case, the reviewing court herein held that the parties seeking to assert the right had waived it because they had referred to it in a less than precise manner. However this Court has held that in circumstances of this kind, when the protection of fundamental rights are involved, jurists should seek to fulfill the demands of elementary and fundamental justice rather than to rely on obscure procedural niceties in an

effort to avoid deciding hard cases. In short, reviewing courts should not be looking for ways in which a party can be held to have mistakenly and inadvertently given up a cherished constitutional right.

The Court's holding on this issue is fully consistent with the precept of law which holds that "When a constitutional right is vested in a party and there is doubt as to whether he waived it, such doubt should be resolved in his favor" 28 *Am Jur* 2nd, "Estoppel and Waiver", § 164, p. 850. The conclusion follows that even an ambiguous and imprecise assertion of a fundamental right, such as the right to freedom of speech, like the right to be protected from compelled self-incrimination, is enough to preclude a finding of a knowing, intelligent, and voluntary waiver of the right.

CONCLUSION

Undoubtedly the easiest way for a reviewing court to decide a controversial case, particularly a case wherein it suspects that fundamental principles of law may very well impel it to side with an unpopular cause or party, is to affirm it on some procedural or technical ground, thereby effectively consigning the whole case to the "memory hole". This inclination notwithstanding, the weighty concerns inherent in basic and fundamental First Amendment values simply do not allow a court such as the Court of Appeals of the State of Oregon to take this course of action in a case of this kind. This Court has spoken with unmistakable clarity and precision on this issue. The Oregon appellate court was simply wrong in

deciding the Petitioners' case in the manner in which it did. For this reason, this Court should grant this Petition for a Writ of Certiorari, reverse the decision of the Court of Appeals for the State of Oregon and remand this case back to that court for a decision on the merits of the Petitioners' constitutionally based claims and defenses.

This 11th day of March, 1994.

Respectfully submitted,

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Engedaw BERHANU, Personal Representative of the Estate of Mulugeta Seraw, Deceased, Respondent,

v.

Tom METZGER, individually and as President of the White Aryan Resistance, White Aryan Resistance, an unincorporated association; John Metzger, Appellants,

and

Kenneth Mieske and Kyle Brewster, Defendants.

A89-11-07007; CA A67833.

Court of Appeals of Oregon.

Argued and Submitted Dec. 16, 1992.

Decided April 14, 1993.

Wrongful death action was brought in connection with an alleged murder. The Circuit Court, Multnomah County, Ancer L. Haggerty, J., entered judgment on jury verdict for claimant and appeal was taken. The Court of Appeals, Warren, P.J., held that: (1) no review would be made of jury instructions which had not been objected to at trial; (2) claims of constitutional error regarding theories of liability for intentional misconduct had not been preserved; and (3) proper foundation had not been laid for testimony of witness which was excluded.

Affirmed.

Reed Lee, Chicago, IL, argued the cause for appellants. With him on the briefs were Michael Null and

Michael Null & Associates, Chicago, IL, and Patricia Campbell, Salem, Oregon.

Elden Rosenthal, Portland, argued the cause for respondent. With him on the brief were Rosenthal & Greene, Portland, Morris Dees, J. Richard Cohen and Southern Poverty Law Center, Montgomery, AL, and Jeffrey Sinensky, New York City.

Before WARREN, P.J., and RICHARDSON, C.J., and EDMONDS, J.

WARREN, Presiding Judge.

Defendants[1] appeal from a judgment entered on a jury verdict for plaintiff. We affirm.

This case arises from the 1988 murder of Mulugeta Seraw in Portland. Plaintiff, the personal representative of Seraw's estate, brought this action for wrongful death. Defendants represented themselves at the trial. The court submitted the case to the jury on three theories. The first two are theories of intentional wrongful death; the third is based on recklessness. The jury, in a special verdict, found for plaintiff on each theory. It made a single award of damages.

Plaintiff first argues that none of the claimed errors is preserved and that, therefore, we should not consider them. With the exception of a motion to dismiss, he is

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[1] There were five defendants at trial: California defendants Tom Metzger, John Metzger and the White Aryan Resistance (WAR) (defendants) are parties to this appeal. Oregon defendants Mieske and Brewster have filed a separate appeal, which we have affirmed without opinion this date.

correct. Assignments 1, 5 and 8 challenge the questions submitted to the jury on the special verdict form. Defendants did not object to the submission of the verdict form, and we will not consider any claimed errors as to it. *U.S. National Bank of Oregon v. Zellner,* 101 Or.App. 98, 104, 789 P.2d 670, *rev. den.* 310 Or. 122, 794 P.2d 794 (1990).

Assignments 2, 4, 6 and 7 challenge jury instructions to which defendants did not object or take exception, and we will not review them. ORCP 59H. In assignment 9, defendants assert that the trial court should have given a certain instruction on civil conspiracy. They did not request the instruction that they now assert the court should have given. We will not consider the assignment. *See Roberts v. Mitchell Bros.,* 289 Or. 119, 129, 611 P.2d 297 (1980).

Defendants' third assignment challenges the denial of their motions to dismiss and motion for judgment notwithstanding the verdict. The motion to dismiss on constitutional grounds is discussed below. Defendants also moved "to dismiss" at the end of plaintiff's evidence. That motion was directed to the sufficiency of the evidence, and we treat it as a motion for directed verdict. ORCP 60. There was evidence to support plaintiff's theories of the case. The trial court did not err in denying the motion.

Defendants also claim that the trial court erred in denying their motion for judgment notwithstanding the verdict. Denial of that motion is not reviewable. *Burke v. American Network, Inc.,* 95 Or. App. 274, 277, 768 P.2d 924 (1989).

The bulk of defendants' arguments relate to the trial court's denial of their motions to dismiss on constitutional grounds. Those arguments were not preserved. At the pleading stage, defendants moved to dismiss for failure to state a claim. One of their arguments was that the claims for reckless and negligent[2] selection of an agent were prohibited by the First Amendment and the Oregon Constitution. They did not explain that argument further. The trial court denied the motion.

At trial, the American Civil Liberties Union (ACLU) and the Portland National Lawyer's Guild (NLG) each filed a memorandum and presented oral argument to the court addressing the free speech considerations raised by the pleadings. The ACLU raised constitutional concerns only about the claim for reckless selection of an agent. The NLG did not assert any constitutional concerns regarding any of the claims.

Defendant Tom Metzger made a constitutional argument about the agency theory of liability and asserted his view that *Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969), prohibited liability for defendants' conduct. He moved to dismiss the case.

We conclude that defendants did not preserve any claim of constitutional error regarding the two theories of liability for intentional misconduct. Defendants' motion, which followed on the heels of the *amici*'s arguments explicitly conceding the viability of the claims for intentional misconduct, was an adoption of the position stated

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[2] The negligence claim was stricken on plaintiff's motion after the close of his evidence.

by the ACLU. Defendants' argument did not contradict or expand on that position. The trial court specifically ruled only on the motion to dismiss Count II for reckless conduct, which was the issue specifically raised by the ACLU. Defendants did not challenge the court's understanding of the motion by asking for a ruling on the claims for intentional misconduct. The trial court was not asked to rule on a motion to dismiss the claims for intentional misconduct. We do not consider those asserted errors to be errors apparent on the face of the record, and we will not address them. ORAP 5.45(2); *State v. Brown*, 310 Or. 347, 800 P.2d 259 (1990). The only constitutional issues that defendants preserved concern the claim for reckless misconduct.

We need not address those alleged errors. The jury specifically found for plaintiff on two theories of intentional misconduct, in addition to imposing liability for reckless conduct.[3] Even if we were to agree with

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[3] The special verdict form shows the jury's findings:

"*QUESTION NO. 2:* Did one or more of the California defendants – through their agents – substantially assist in, or encourage, the conduct of the Oregon defendants that caused the death of Mulugeta Seraw?

"*ANSWER:* Yes X No _

" * * * * *

"*QUESTION NO. 3:* Were one or more of the California defendants involved in a conspiracy with the Oregon defendants that led to the death of Mulugeta Seraw?

"*ANSWER:* Yes X No _

" * * * * *

"*QUESTION NO. 4:* Did one or more of the California defendants cause the death of Mulugeta Seraw by recklessly selecting or retaining agents to organize

defendants that the recklessness claim is barred by constitutional considerations, the trial court's judgment would nonetheless stand because of the verdict on the other two theories of liability.

Defendants' tenth assignment of error challenges the trial court's ruling that it would not allow testimony or evidence on cross-examination of David Mazzella that he was at a local night club distributing literature and recruiting for the Ku Klux Klan on October 12, after the first day of his testimony in this trial. They assert that "the evidence relating to this event not only tended to impeach some of Mazzella's earlier testimony which suggested, in part, his lack of bias, it also showed, directly and powerfully, Mazzella's bias against [defendants] and his motives for lying about them on the witness stand."

Defendants' failure to make an offer of proof or to inform the court what evidence or testimony they sought to introduce leaves this court without the information needed to consider the assignment.[4] We do not know

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East Side White Pride?
"*ANSWER:* Yes X No _"

[4] Nothing in the portion of the transcript to which defendants refer indicates what witnesses, if any, defendants were prevented from calling, how they could have testified, or what other evidence was excluded because of the trial court's ruling. Tom Metzger told the court that "we will present witnesses" that Mazzella was at the club recruiting for the Klan on October 12. That is the most specific reference to any evidence or testimony that was excluded. Without more, we cannot determine whether the trial court's ruling that it would exclude evidence regarding Mazzella's activities was error, let alone prejudicial error. *See State v. Affeld*, 307 Or. 125, 764 P.2d 220 (1988).

whether defendants had witnesses who could have testified in contradiction to Mazzella's apparent denial that he was at the night club that night. As the Supreme Court recently explained:

> "Adequate offers of proof are required to ensure that appellate courts are able to determine (1) whether it was error to exclude the evidence, and (2) whether any error was likely to have affected the result of the case. *State v. Affeld, supra* [n 4], 307 Or [125] at 128[, 764 P.2d 220]." *State v. Busby,* 315 Or. 292, 298, 844 P.2d 897 (1993).

Here, we cannot determine either, and therefore we cannot say that the court's ruling was in error.

Affirmed.

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

ENGEDAW BERHANU, Personal Representative of the Estate of Mulugeta Seraw, Deceased, Plaintiff-Respondent, v. TOM METZGER, individually and as President of the White Aryan Resistance; WHITE ARYAN RESISTANCE, an unincorporated association; JOHN METZGER, Defendants-Appellants, and KENNETH MIESKE and KYLE BREWSTER, Defendants.	Multnomah County Circuit Court No. A8911-07007 CA A67833 SC S40469 **ORDER DENYING RECONSIDERATION**

The Court of Appeals has considered the Petition for Review filed in this case as a Petition for Reconsideration and has denied the petition. ORAP 9.15. The Supreme Court may now proceed to determine whether to grant review. The appellate court decision is not enforceable until the Supreme Court has completed its review of the petition. ORAP 14.05.

S/W. L. RICHARDSON
WILLIAM L. RICHARDSON
CHIEF JUDGE

September 1, 1993
DATE

c:	Jeffrey Sinensky	Attorney for Plaintiff-Respondent
	J. Richard Cohen	Attorney for Plaintiff-Respondent
	Elden M. Rosenthal	Attorney for Plaintiff-Respondent
	Morris S. Dees	Attorney for Plaintiff-Respondent
	Tom Metzger	*Pro Se* Defendant-Appellant
	White Aryan Resistance	*Pro Se* Defendant-Appellant
	John Metzger	*Pro Se* Defendant-Appellant
	Michael Null	Attorney for Defendants-Appellants

IN THE SUPREME COURT OF THE STATE OF OREGON

ENGEDAW BERHANU, Personal Representative of the Estate of Mulugeta Seraw, Deceased, Plaintiff-Respondent, Respondent on Review, v. TOM METZGER, individually and as President of the White Aryan Resistance; WHITE ARYAN RESISTANCE, an unincorporated association; JOHN METZGER, Defendants-Appellants, Petitioners on Review. and KENNETH MIESKE and KYLE BREWSTER, Defendants.	Multnomah County Circuit Court No. A8911-07007 CA A67833 SC S40469 **ORDER DENYING REVIEW**

The Court has considered the petition for review and ORDERS that it be denied.

DATE: November 16, 1993

/S/WALLACE P. CARSON JR.
WALLACE P. CARSON, JR.
CHIEF JUSTICE

c:	Jeffrey Sinensky	Attorney for Plaintiff-Respondent
	J. Richard Cohen	Attorney for Plaintiff-Respondent
	Elden M. Rosenthal	Attorney for Plaintiff-Respondent
	Morris S. Dees	Attorney for Plaintiff-Respondent
	Tom Metzger	*Pro Se* Defendant-Appellant
	White Aryan Resistance	*Pro Se* Defendant-Appellant
	John Metzger	*Pro Se* Defendant-Appellant
	Michael Null	Attorney for Defendants-Appellants

* * *

[p. 693] think that rapper music is quite the lifestyle of skins. Why do you go to recruit at a rapper club?

MR. DEES: Your Honor, objection. Your Honor, he said he never went to the places.

MR. TOM METZGER: Well, he said he went to there to distribute literature.

Didn't you?

THE WITNESS: Out in front, yes.

BY MR. TOM METZGER:

Q. You have never been inside of the Confetti Club?

A. No, I haven't.

Q. Isn't it true, Mr. Mazzella, that on this very Friday night at 12:00 o'clock to 1:00 in the morning, about 1:00 in the morning –

MR. DEES: What's your question again?

MR. TOM METZGER:

Q. You were in the Confetti Club?

A. No.

Q. And isn't it true that you were recruiting for a klan group in Eugene, Oregon?

A. No, it's not. I'm under 24-hour watch right now.

THE COURT: No. No, he's talking about the night in question, November 12th.

THE WITNESS: Oh. No, I was at Nick Heise's place and we had left a minute before.

[p. 694] BY MR. TOM METZGER:

Q. I'm not talking about the fight now, Mr. Mazzella. I'm talking about this past Friday evening.

THE COURT: Excuse me.

MR. TOM METZGER: Pardon me.

THE COURT: I thought you were referring to November 12th, between midnight and 1:00, when the incident took place?

MR. TOM METZGER: No. I'm sorry, Your Honor, I was not. I was referring to this last Friday night and early Saturday morning.

THE COURT: How would that be relevant?

MR. DEES: I object to relevancy, Your Honor.

MR. TOM METZGER: The relevancy is we will present witnesses, probably later in this trial, that this man, while a star witness –

MR. DEES: Your Honor, I object.

MR. TOM METZGER: Was in that club recruiting for the klan.

MR. DEES: He's going to tell the jury something totally irrelevant. I ask this be heard outside the presence of the jury. This is just a cheap shot.

THE COURT: We are not going to go back and forth, and we won't try and talk over each other.

As to Mr. Mazzella's activities this past Friday [p. 695] night, the Court will sustain that objection, Mr. Metzger. It's not relevant to this. Nor will witnesses be allowed to testify as to Mr. Mazzella's conduct or places he attended here in the last week or so, unless it pertains to a specific statement by Mr. Mazzella that has some reference to this trial.

So, the objection is sustained.

MR. TOM METZGER: Well, the relevancy, Your Honor –

MR. DEES: Can Your Honor take this up outside the presence of the jury? I don't know what this man is trying to pull.

THE COURT: Okay. We should proceed.

MR. TOM METZGER: Your Honor, do we discuss this in your chambers?

THE COURT: Ladies and gentleman, we'll take a recess at this point. At this point in time, again, don't discuss the case. Leave your notebooks on your respective chairs.

* * *

(Whereupon, the following proceedings were had in open court, outside the presence of the jury.)

* * *

THE COURT: Okay. You can step down.

Mr. Metzger.

[p. 696] MR. TOM METZGER: Well, information, Your Honor, far from being the repentant person

that has turned over a new leaf. In fact, Mr. Mazzella is right at this moment active in recruiting for racist groups who we don't know about or which have simply been in the newspaper in the Portland or in the Southern Oregon area, and we have witnesses in this front page article in the Oregonian. He's been IDed. He's been at the club Friday night. Saturday he's there. He approaches people. He has dialogue with them to bring them into the klan, some klan group. The man explains he's thrown out of the club with three other people with him, and Mr. Dees testified and said he was playing cards with the man at 1:00 o'clock in the morning. I think it's very relevant. If this man is running around recruiting, he's supposed to be, number one, a prisoner, anyhow, I think it's very relevant.

THE COURT: Well, the fact that you think it's relevant doesn't get over the fact that I have ruled it's not relevant. Mr. Dees' statements, if you could even get those in, that wouldn't be relevant. So, the point is, as I see the issues for this jury, Mr. Mazzella's presence at a location this past Friday night is not relevant. It has nothing to do with any issue in the case.

The fact that you have been allowed to cross-examine him on his activities in the Southern Oregon area does not give you leeway to present what you believe are his [p. 697] associations here at a club this past Friday night.

So, I'm objecting to that testimony, and I'm sustaining any area of inquiry concerning Mr. Mazzella's presence or location this past Friday evening.

MR. TOM METZGER: Can I say one more thing, Your Honor?

THE COURT: You may.

MR. TOM METZGER: It goes to motive. If we have shown that Mr. Mazzella was, in fact, a member of the American klan and an organization of Modesto, California, carried application forms to Oregon when he came here to attempt to sign up people in that American klan and then, during the very time that he's giving testimony, he's out recruiting for that klan, it shows motive of a klan group that also would be thrilled to death if Tom Metzger and John Metzger were ruined civilly.

THE COURT: Anything by plaintiffs?

MR. DEES: Your Honor, he fully explored that on direct with Mr. Mazzella, his past role with every organization. I object strenuously. I believe the Court has ruled.

THE COURT: Okay.

We'll take a ten minute recess at this point in time. The Court will be in recess.

* * *

[p. 736] identification at this time on the letter itself, and I will staple it and give it to the Court to be marked for identification.

THE COURT: Very well.

Now, if either side wishes a copy of this letter, I don't know if you still retain a copy or do you want a copy so that you can use it for preparation, we can make copies of the original letter for both sides.

MR. DEES: That would be helpful for both sides before lunch.

THE COURT: Before lunch, Mr. Dees?

MR. DEES: Well, yes, we'll do it.

THE COURT: I prefer the clerk to do it.

MR. DEES: Okay. Thank you, sir.

THE COURT: We'll make copies, one, two, three copies of Exhibit 146.

All right. Anything further?

MR. TOM METZGER: No.

THE COURT: The Court will be in recess. 1:30.

* * *

(Whereupon, lunch recess was taken.)

* * *

THE COURT: Okay. You can be seated.

MR. TOM METZGER: Your Honor, can I address you before you bring in the jury? I wasn't quite understanding [p. 737] before we took the morning break, and I explained my reasoning for relevancy from the membership in the klan to the witnesses saying that Mr. Mazzella had attempted to sign up people in the klan up here, and the allegations then that the witness over this last weekend was attempting to sign up people in the klan at the Confetti Club, and how I didn't think – I thought you were going to go back and think about that the relevancy of it, and I'm not clear on what position you're taking.

THE COURT: Okay.

If I understand the nature of your question, Mr. Metzger, it arises from the article that was in the morning Oregonian concerning Mr. Mazzella's alleged whereabouts this past Friday. That's a problem with newspaper articles, and that's why generally they are excluded. The Court considered the sources of your question, in light of the fact that Mr. Dees' purportedly indicated that the witness could not have been there.

Now, the problem we have with that area of inquiry is this. It's collateral to this trial insofar as Mr. Mazzella testified he's never been inside of the Confetti Club, and your wanting to impeach his testimony on something that I just deemed to be irrelevant, whether he was there this past Friday.

If you had evidence that would contradict Mr. Mazzella's whereabouts on the evening in question, then it [p. 738] might be an appropriate area of inquiry. But here, now almost two plus years later, I don't think it's relevant for this jury to have to decide whether or not that newspaper article is, in fact, true or false.

He denied that he was involved with organizing the klan in Southern Oregon. Now, he's made that statement and denied that, and again you're trying to impeach his testimony with something collateral to this trial. So, that's why I ruled it would not be admissible. I did not necessarily say it was not relevant. I just said it would not be admissible.

MR. TOM METZGER: Well, there again, I would simply, going to motive, that the witness had other

motives, totally different motives possibly there, other than he was a member. He did establish he was a leader in this klan. He came up. He tried to sign up people in it. And then we have the allegations of the further klan activity, that this man could be coming from a position of this klan group, is attempting, as the plaintiffs, to financially destroy Tom Metzger. That's what I was getting at.

THE COURT: And he has answered that question insofar as his understanding of whatever. He said he didn't know what your financial wealth was. So, he didn't know whether the plaintiffs were intending to destroy you financially or not.

But the area of inquiry, at this time, the Court [p. 739] deems it's collateral to the issues in the case, especially in light of the fact that Mr. Mazzella has denied any further involvement with any group. And that's why I ruled that you could not seek to impeach his testimony with, one, the newspaper article of any witnesses that purportedly saw him in the Confetti Club this past Friday or Saturday.

MR. TOM METZGER: I understand, Your Honor, but I do object for the record.

THE COURT: Your record is noted – excuse me, your objection is noted.

Okay. Anything further?

MR. DEES: No, Your Honor.

THE COURT: Okay.

Mr. Mazzella, you can retake the stand.

* * *

(Whereupon, the following proceedings were had in open court, in the presence of the jury.)

* * *

THE COURT: John Metzger, you may continue.

BY MR. JOHN METZGER:

Q. Mr. Mazzella, when did Aryan Youth Movement change its name to White Aryan Resistance Youth?

A. I believe it was 1986.

Q. 1986?

A. I believe so.

Supreme Court, U.S.
FILED
APR 28 1994
OFFICE OF THE CLERK

No. 93-1470

In The Supreme Court of the United States

October Term, 1993

Tom Metzger, John Metzger, and White Aryan Resistance,
Petitioners,

v.

Engedaw Berhanu, Personal Representative of the Estate of Mulugeta Seraw,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of Oregon

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the decision of the Court of Appeals of Oregon was based upon independent and adequate state grounds when it determined that petitioners had waived certain First Amendment objections in a wrongful death case?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1470

TOM METZGER, JOHN METZGER, AND
WHITE ARYAN RESISTANCE,
Petitioners,

v.

ENGEDAW BERHANU, PERSONAL REPRESENTATIVE
OF THE ESTATE OF MULUGETA SERAW,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of Oregon

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This wrongful death action stemmed from the brutal murder of Mulugeta Seraw in Portland, Oregon on November 13, 1988. Five defendants were originally named in this lawsuit—two from Oregon and three from California.

The two Oregon defendants—Kenneth Mieske and Kyle Brewster—were alleged to have carried out the actual killing. The California defendants (petitioners here)—Tom Metzger, John Metzger, and the White Aryan Resistance (WAR)—were alleged to be vicariously liable for the slaying under three theories. *First*, plaintiff claimed that the California defendants—through the vice president of their WAR youth organization—had substantially assisted in and encouraged the conduct of the

Oregon defendants that caused Seraw's death. *Second*, plaintiff claimed that the California defendants and the Oregon defendants had engaged in a conspiracy to commit acts of racial violence and that Seraw had been killed pursuant to the conspiracy. *Third*, plaintiff claimed that Seraw's death was caused by the California defendants' recklessness in selecting an agent to send to Portland to organize the Oregon defendants' skinhead gang.[1]

A. Factual Background [2]

White Aryan Resistance ("WAR") is a white racist organization that advocates racial violence against African-Americans, Hispanic-Americans, and Jews. Exs. 68, 75. Petitioner Tom Metzger is the director of WAR. His son, petitioner John Metzger, heads WAR Youth, the "youth section" of WAR. Ex. 8. Prior to Seraw's murder, the Metzgers, through the youth wing of WAR, sought to encourage violent racist attacks by skinheads. Ex. 53 at 1. In an effort to expand the WAR organization, the Metzgers dispatched their best organizer, David Mazzella, the vice-president of WAR Youth, Ex. 53 at 3; Tr. 155, 434, to Portland, Oregon to establish a working relationship with one of the Portland skinhead groups, East Side White Pride (ESWP). Tr. 422, 578-79; Ex. 1 (J. Metzger letter to ESWP introducing Mazzella).

From the time he arrived in Portland in the beginning of October 1988 until Seraw's murder five weeks later, Mazzella spent most of his time "getting [ESWP members] together and teaching them violence" by "taking them out" to commit violent acts against minorities and by "preaching." Tr. 488. Through his efforts, Mazzella

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[1] Hereinafter, the first theory for liability will be referred to as the "substantial assistance" claim, the second as the "conspiracy" claim, and the third as the "reckless selection of an agent" claim.

[2] Respondent is obliged to submit this factual background due to the numerous inaccuracies and omissions contained in petitioners' statement. Sup. Ct. R. 15.1.

transformed ESWP from a "sloppily organized group" into one that had "something to focus on." Tr. 488-89. On several occasions, Mazzella led the members of ESWP on "hunting parties" to seek out minorities and provoke fights. Tr. 429-35, 654-56. As Mazzella explained, "the best way to really talk [to skinheads] about violence is to show them the violence." Tr. 435. In one letter, Mazzella bragged that "ESWP [had] . . . beaten up 80 people in 4 days." Ex. 145.

With the Metzgers' approval, Mazzella had used violence before to organize skinheads for WAR. Tr. 431-35. While he was repeating the pattern in Portland, Mazzella kept in close contact with the Metzgers. Tr. 488-89. Tom Metzger clearly approved of Mazzella's Portland activities on behalf of WAR Youth. In a recorded message broadcast shortly before Seraw's murder, Metzger boasted that "the fights and attacks against the race-mixers and some of the race traitors and the racial scum [in Portland], has been picking up because of the new warriors moving into the area." Ex. 86 at 1.

Mazzella spent much of the day of Seraw's murder with the members of ESWP, including the Oregon defendants. In the morning, Mazzella held a meeting, during which they discussed sporadic, random acts of violence against minorities. Tr. 445-46. As Mazzella later testified, "*every time the group would go to a low, when there wasn't really much publicity, we would commit acts of violence.*" *Id.* (emphasis added). That evening, after distributing WAR material in downtown Portland, Mazzella and several ESWP mmbers met to discuss "the movement." Tr. 611. During the discussion, one ESWP member drew a picture in Mazzella's WAR notebook of a black man with a bullet being shot through his head. Tr. 610-11, 760-61; Ex. 138.

As the Oregon defendants were leaving the meeting, they spotted Mulugeta Seraw [3] and two of his Ethiopian

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[3] Seraw was a twenty-eight year old Ethiopian national. Born to a farming family, he had come to Portland to go to college. Tr.

friends. Tr. 373. Just as Mazzella had trained them to provoke minorities on numerous occasions, the ESWP members tried to irritate Seraw and his companions. Tr. 249-50. They attacked the three Ethiopian men, and with repeated blows to the head with a baseball bat, Mieske crushed Seraw's skull. Tr. 359-60, 378; Ex. 163.

Within hours, Mieske and other ESWP members told Mazzella about the killing. Tr. 453-54. The next day, Mazzella reported the incident to Tom Metzger. Tr. 455-56. Metzger told Mazzella to keep his "mouth shut," advice that Mazzella shared with ESWP. Tr. 456-57. When Mieske was arrested, he immediately called Tom Metzger in San Diego. Tr. 181, 1007. In acordance with his standard operating procedure, Metzger advised Mieske to take the Fifth. Tr. 181, 269.

In an interview conducted just three weeks after the murder, John Metzger boasted that Mazzella, whom he identified as his vice-president, had successfully organized Portland skinheads for the Metzgers' WAR organization. Metzger emphasized that "skinheads these days are deadlier than the skinheads of just two years ago," and offered to "send Mazzella or another organizer to Seattle to try to repeat the success in Portland." Ex. 139, 139A.

B. Procedural Background

On November 27, 1989, the personal representative of Mulugeta Seraw's estate filed a wrongful death action in the Mulnomah County (Oregon) Circuit Court, pursuant to Oregon Revised Statutes § 30.020, against Mieske, Brewster, and the petitioners herein—Tom Metzger, John Metzger, and WAR.

Although petitioners retained counsel on appeal, they represented themselves in the trial court. Petitioners

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1235, 1239. He was a small man, standing only five feet seven inches and weighing about 135 pounds. Tr. 1181. He was known as a quiet and friendly person. Tr. 1214, 1243.

claim that they were forced to proceed without counsel because respondents had frozen their real property in a California state court action.[4] Petition at 8. But petitioners fail to disclose that the California case was not filed until six months *after* this case began. At no time during the intervening months did petitioner choose to hire a lawyer despite their substantial financial resources[5] and the obvious risks posed by this litigation. Furthermore, at no time after the filing of the California action—an action prompted by Tom Metzger's attempt to fraudulently convey his property—did Metzger ask the California court for permission to use the real property to hire a lawyer.

In any event, petitioners were given abundant assistance in litigating their case. The trial judge instructed petitioners every step of the way regarding procedural

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[4] Shortly after the commencement of this suit, petitioner Tom Metzger transferred real property in California worth over $90,000 to his wife by quitclaim deed for no consideration. Respondent filed an action on May 11, 1990 in San Diego County Superior Court seeking to set aside this transfer, asserting that the transfer had been made to shelter Metzger's assets from a potential judgment in the Oregon action and any other creditors. Appendix at 2a-4a. The San Diego County complaint also sought to have Metzger restrained from transferring or disposing of this property until the Oregon trial. *Id.* at 4a-5a. After a temporary restraining order was issued against them, 6a-7a, Metzger and his wife entered into a stipulation agreeing not to transfer this property until sixty days after the Oregon trial ended. Appendix at 8a-13a.

[5] During the trial, financial records pertaining to petitioners Tom Metzger and WAR were introduced into evidence. Metzger had two bank accounts, one for WAR and the other for his business, Fallbrook TV. Tr. 1093-94. These records established that, during 1989, deposits into WAR's bank account alone averaged approximately $3000.00 per month. Pls. Ex. 105 at 2. Although John Metzger testified at trial that approximately seventy percent of WAR's income was received in cash, Tr. 918, the cash deposits into the WAR account amounted to only fourteen percent of the total deposits. Pls. Ex. 105 at 3.

issues. For example, prior to charging the jury, the court explained to petitioners the necessity of objecting to any instructions with which they disagreed. As the court told petitioners,

> what you should do is go through the requested instructions and determine whether there are any instructions you object to? [sic] If you have objections to their [plaintiff's] proposed instructions, you must be able to state your objections for the record so that I can determine whether or not to sustain or overrule your objections to the proposed instruction.

The court later told petitioners that they would have to take an exception to the court's rulings on jury instructions in order to preserve an issue for appeal.

In addition, the trial judge allowed the Oregon chapter of the American Civil Liberties Union (ACLU) to brief the First Amendment issues raised by the case as a friend of the court. At the oral argument of these issues, the ACLU informed the court that it had no First Amendment concerns about either of the intentional misconduct counts—substantial assistance and conspiracy. Tr. 1281. The ACLU directed all of its concerns to the "reckless selection of an agent" claim. *Id.*

Petitioners joined this objection to the "reckless selection" claim, citing *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Tr. 1296-99. In denying this objection, the trial court clearly stated that it was interpreting petitioners' objection as being solely on this claim. Tr. 1299-1300. Petitioners did not make any attempt to correct the trial court's understanding of their objection. *Id.* at 1300. After the trial court denied petitioners' motion to dismiss the "reckless selection" claim, petitioner Tom Metzger stated that

> I would just like to make a motion to dismiss the entire case. They haven't proved it. They haven't

> proved their case. They certainly haven't proved intent.

Id. at 1302. The trial court similarly denied this motion. *Id.* at 1303.

The trial court included several jury charges to ensure that petitioners would not be held liable for speech or action that was protected under the First Amendment. Before the Oregon jury adjourned to consider the evidence, the trial court instructed the jury that

> [t]he right of free speech protects a person's right to express political or social ideas. It even protects a person's right to advocate the abstract need for violence sometime in the indefinite future.
>
> But the right of free speech is not absolute. *It does not allow a person to prepare a group for violent action and spur it on to such action in the immediate or near future.*
>
> I instruct you that if you find by a preponderance of the evidence that John Metzger, Tom Metzger or WAR, through an agent, prepared Kenneth Mieske or Kyle Brewster for violent action and spurred them on to such action in the immediate or near future, the free speech defense fails.

Jury Charge Number 31 (emphasis added). This instruction was patterned after the standard set forth in *Noto v. United States*, 367 U.S. 290, 297-98 (1961), which was reaffirmed as recently as 1982. *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982). Petitioners failed to object to this instruction, even though they were given opportunities to do so both when the instruction was discussed and later at the end of the discussion regarding all instructions. When the trial court asked whether petitioners had "[a]ny problems with Plaintiff's

Number 31," petitioner Tom Metzger explicitly stated that they did not.[6]

The court further charged the jury that they

> must be careful not to base your decision about the responsibility of Tom Metzger, John Metzger, or WAR in any way on the fact that they may have expressed views that are unpopular. The First Amendment guarantees every person the right to express his views freely, even if those views may be morally repugnant to the rest of the community. *But, the First Amendment does not prevent you from looking at the words of the Metzgers and WAR as evidence of what they may have done or what they may have instructed other people to do.*

Jury Charge Number 39 (emphasis added.) This instruction was based directly on language in *Claiborne Hardware*, 458 U.S. at 927. Petitioners' objection to this instruction was overruled.

The jury found petitioners liable for the wrongful death of Seraw on three separate theories: 1) that petitioners, through their agents, substantially assisted in, or encouraged, the conduct which caused the death of Seraw; 2) that petitioners were involved in a conspiracy that led to Seraw's death; and 3) that petitioners caused the death of Seraw by recklessly selecting or retaining agents to organize the racist skinhead organization. The jury awarded respondent one set of damages based on the three verdicts, and the trial court entered judgment in accordance with the jury's verdict, with slight modifications.

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[6] Petitioners' failure to object to this instruction waived any assertion of error based on the instruction under Oregon procedure. Oregon Rule of Civil Procedure 59(H) ("no instruction given to a jury shall be subject to review on appeal unless its error, if any, was pointed out to the judge who gave it and unless a notation of an exception is made immediately after the court instructs the jury"); *see Berhanu v. Metzger*, 850 P.2d 373, 374 (Or. App. 1993); *Utility Equipment, Inc. v. Morbark Industries, Inc.*, 763 P.2d 164, 169 n.5 (Or. App. 1988), *aff'd*, 779 P.2d 139 (Or. 1989).

The Court of Appeals of the State of Oregon affirmed the judgment against petitioners. *Berhanu v. Metzger*, 119 Or. App. 175, 850 P.2d 373 (1993). In response to their First Amendment assignment of error, the court determined that petitioners had failed to preserve any First Amendment objection to the substantial assistance and conspiracy claims. The court based this determination on its review of the record and the fact that the trial court, without objection, specifically ruled only on petitioners' First Amendment objection to the reckless selection of an agent claim. 850 P.2d at 375. Pursuant to Oregon law, the court held that it could not provide petitioners any relief because "even if [the court] were to agree with [petitioners] that the recklessness claim is barred by constitutional considerations, the trial court's judgment would nonetheless stand because of the verdict on the two other theories of liability." *Id.* at 375-76.[7] The Oregon Supreme Court denied petitioners' request to review the decision of the Court of Appeals. 865 P.2d 1296 (Or. 1993).

REASONS FOR DENYING THE WRIT

Petitioners concede that they failed to raise specific First Amendment objections to either theory of intentional misconduct. Petition at 9. Nonetheless, petitioners seek to have this Court review the state procedural grounds for the decision of the Oregon Court of Appeals and remand this case to that court to consider their waived First Amendment defenses. Petition at 15.

Respondents respectfully submit that this Court should not grant certiorari to review the decision of the Court of Appeals of Oregon because: (1) the decision was based upon independent and adequate state grounds; and

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[7] The Oregon Court of Appeals, in applying this rule, was following established Oregon precedent that when a special verdict form is used, as here, the submission of an erroneous theory of liability does not warrant reversal if the verdict also is supported by a second theory not similarly flawed. *See Byers v. Santiam Ford, Inc.*, 574 P.2d 1122, 1124 (Or. 1978).

(2) even if this Court did have jurisdiction to review this decision, the issues raised by petitioner are not be suitable for granting certiorari because the decision does not conflict with any decision of this Court or raise any question of federal law that is unsettled by this Court.

I. THIS COURT HAS NO JURISDICTION TO REVIEW THE DECISION OF THE COURT OF APPEALS OF OREGON WHICH WAS BASED ON INDEPENDENT AND ADEQUATE STATE GROUNDS

The Oregon Court of Appeals based its decision on its interpretation and application of Oregon Rule of Appellate Procedure 5.45.[8] This Court has long recognized that it is without jurisdiction to review the decision of a state court when the state court's decision is based on an adequate state ground that is independent of any federal basis. *Michigan v. Long*, 463 U.S. 1032, 1038 n.4 (1983); *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Wood v. Chesborough*, 228 U.S. 672, 677 (1913). "Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground." *Michigan v. Long*, 463 U.S. at 1040.

Noncompliance with a state procedural rule, such as the failure to object in a timely manner or raise an issue in the trial court, provides such an adequate state ground. *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991); *Webb*

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[8] This rule provides that

> [n]o matter assigned as error will be considered on appeal unless it was preserved in the lower court . . .

O.R.A.P. 5.45(2). The only exception to this rule recognized under Oregon procedure exists for "errors of law apparent on the face of the record." *Id.* The rationale for this requirement that a claim be presented to the trial court is "to allow the adversary to present his position and to permit the court to understand and correct any error." *State v. Brown*, 800 P.2d 259, 265 (Or. 1990); *State v. Hitz*, 766 P.2d 373 (Or. 1988).

v. Webb, 451 U.S. 493, 496-97 (1981) ("the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows . . . that the federal claim was adequately presented in the state system"); *Edelman v. California*, 344 U.S. 357, 358-59 (1953). To provide a federal ground for decision, even Federal constitutional rights must be presented to state courts in accordance with the requirements of general state procedure. As this Court stated in *Ford v. Georgia*, "a 'firmly established and regularly followed state practice' may be interposed to prevent subsequent review by this Court of a federal constitutional claim." 498 U.S. at 424 (citation omitted).[9] So long as the state court applies its procedure in a consistent manner,[10] "powerful policy considerations . . . strongly indicate that [this Court] should apply this principle with sufficient rigor to make reasonable certainty that [the Court] entertain[s] cases from state courts only where the record clearly shows that the federal issue has been properly raised below." *Webb*, 451 U.S. at 499.

The decision of the Court of Appeals of Oregon affirming the trial court and rejecting petitioners' First Amendment contentions was based on its application and interpretation of an Oregon procedural rule. Because this determination was based upon an independent and adequate state procedural ground, this Court does not have juris-

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[9] *See Michigan v. Tyler*, 436 U.S. 499, 512 n.7 (1978) ("[f]ailure to present a federal question in conformance with state procedures constitutes an adequate and independent ground of decision barring review in this Court, so long as the State has a legitimate interest in enforcing its procedural rule"); *Edelman*, 344 U.S. at 358-59 ("this Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law.").

[10] Petitioners have raised no issue that O.R.A.P. 5.45 has not been consistently applied to all litigants by the courts of Oregon. *See Barr v. City of Columbia*, 378 U.S. 146, 149-150 (1964); *N.A.A.C.P. v. Alabama ex rel. Flowers*, 377 U.S. 288, 293-302 (1964). Nor would any such argument have merit.

diction to review the decision of the Court of Appeals of Oregon.

II. NOTWITHSTANDING THIS LACK OF JURISDICTION, THE CONSIDERATIONS THAT USUALLY SUPPORT CERTIORARI ARE ABSENT HERE

Even if this Court were to determine that the decision of the Court of Appeals of Oregon did not rest on independent and adequate state grounds and therefore this Court had jurisdiction to consider petitioners' contentions, the petition would not be suitable for certiorari. Review on writ of certiorari is not a matter of right, but of judicial discretion. Rules of the Supreme Court of the United States 10. This Court will exercise the discretion to grant the writ in a case such as this only when the matter involves 1) a decision that conflicts with a decision of this Court, or 2) an important question of federal law, unsettled by this Court. *Id.* at 10.1(c). In the present action, no such issue exists.

A. The Oregon Court of Appeals Decision Does Not Conflict With Any Decision of This Court

Petitioners contend that a First Amendment right may only be relinquished by a civil defendant by means of a "knowingly, intelligently and voluntarily" waiver of those rights. Petition at 17. The "knowing, intelligent and voluntary" standard asserted by petitioners, however, has been applied by this Court only to the waiver of constitutional protections by criminal defendants. *See, e.g., Colorado v. Spring*, 479 U.S. 564 (1987); *Miranda v. Arizona*, 384 U.S. 436 (1966). Petitioners assert that the decision of the Oregon Court of Appeals conflicts with this Court's decision in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). Petition at i (Question Presented), 17. However, as this Court noted in *Curtis Publishing*, a "known right or privilege", even involving federal constitutional grounds, may be procedurally waived during a civil trial by not properly raising it. *Id.* at 143.

In *Curtis Publishing*, this Court invoked an exception to the general rule regarding procedural waiver for situations in which a party failed to "interpose [a constitutional] defense prior to the announcement of a decision which might support it." *Id.* at 143. The petitioner in *Curtis Publishing* had been found responsible by a jury for the libel of a public figure just prior to this Court's decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Although petitioner had not asserted a *Times* defense during trial, petitioner filed a motion for new trial in the trial court immediately after the *Times* decision was rendered. While this Court acknowledged that "even constitutional objections may be waived by a failure to raise them at a proper time," it held that petitioner had not waived his *Times* defense because the defense was not a "known right or privilege" at the time that petitioner was tried. 388 U.S. at 143. In the present action, all rights or privileges now asserted by petitioners were known and firmly established, as there were no new decisions at issue.

B. The Oregon Court of Appeals Decision Does Not Raise Any Question of Federal Law That Is Unsettled by This Court

Petitioners do not seek an adjudication of their federal First Amendment rights, but merely request this Court to remand this case to the Court of Appeals of Oregon to consider their First Amendment objections to the intentional misconduct claims. Petition at 15. To do so, this Court must hold that even if a party does not comply with State procedural rules, a party cannot inadvertently waive a First Amendment objection. Even if the Court were willing to consider such a rule, this case would be an inappropriate one in which to do so because petitioners' failure to assert a First Amendment defense to the two intentional misconduct claims was knowing and intelligent.

During the proceedings before the trial court, petitioners were aware of all of the rights that are now the basis of their petition and each of these asserted rights was well-established at the time it properly would have been asserted. The First Amendment defense now relied upon by petitioner to challenge all three bases of liability before this Court was argued before the trial court to challenge only the "reckless selection" count. It is clear that petitioners only presented a First Amendment objection to the reckless selection claim because their objection was based upon the amicus argument of the ACLU. *See supra* at 6. The ACLU indicated that it had no First Amendment concerns regarding the intentional misconduct claims. Petitioner, being fully aware of this argument at the time of trial, had a duty under Oregon procedure to explicitly object to the substantial assistance and conspiracy counts on First Amendment grounds at the appropriate time.[11]

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[11] To the extent that any First Amendment rights were implicated, they were properly addressed and protected by the trial court. The First Amendment protects "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence." *Brandenburg*, 395 U.S. at 448 (quoting *Noto*, 367 U.S. at 297-98); *see Claiborne Hardware*, 458 U.S. at 928. But it does not protect speech or actions of an individual "preparing a group for violent action or steeling it to such action." *Noto*, 367 U.S. at 298; cited with approval in *Claiborne Hardware*, 458 U.S. at 928; *Brandenburg*, 395 U.S. at 448.

This Court has recognized that a "State legitimately may impose damages for the consequences of violent conduct." *Claiborne Hardware*, 458 U.S. at 918. Furthermore, an organization "may be held responsible for the acts of its agents throughout the country that are undertaken within the scope of their actual or apparent authority." *Id.* at 930. The trial court gave an instruction patterned after *Noto*, and the evidence established that petitioners had in fact "prepar[ed] a group for violent action" and "steel[ed] it to such action."

CONCLUSION

For the foregoing reasons the writ should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

[Filed May 11, 1990]

SUPERIOR COURT OF THE STATE
OF CALIFORNIA IN AND FOR THE
COUNTY OF SAN DIEGO

Case No. 624088

ENGEDAW BERHANU, Personal Representative of the Estate of MULEGETA SERAW, Deceased,
Plaintiff,

v.

TOM METZGER, KATHLEEN METZGER, and DOES I through X, Inclusive,
Defendants.

COMPLAINT TO SET ASIDE FRAUDULENT TRANSFER AND FOR DAMAGES

[CC § 3439.01, et seq.]

Plaintiff alleges:

FIRST CAUSE OF ACTION
(TO SET ASIDE FRAUDULENT TRANSFER)

1. Defendants are, and at all times herein mentioned were, residents of San Diego County, California and have been husband and wife, cohabitating at 308 Sunbeam lane, Fallbrook, California for over twenty years.

2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I through X, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is

informed and believes and thereon alleges that each of the fictitiously named defendants claims an interest in the property hereinafter described and which is the subject of this action.

3. From and after November 13, 1988 the Estate of Mulgeta Seraw has been the holder of a certain claim against Defendant TOM METZGER. This claim consists of a tort cause of action for wrongful death and punitive damages.

4. On November 27, 1989, an action was commenced by Plaintiff against Defendant TOM METZGER based on the aforementioned claim. No judgment in that action has yet been rendered. This matter is set for trial on October 8, 1990 in Multnomah County, Oregon.

5. At all times herein mentioned, Defendants TOM METZGER and KATHLEEN METZGER as joint tenants, were the owners and in possession and control of that real property situated in San Diego County, known as 308 Sunbeam Lane, Fallbrook, California and more particularly described as follows:

> The North 77.50 feet of the South 495 feet of the East 128 feet of the West 328 feet of the Northeast Quarter of Section 25, Township 9 South Range 4 West, San Bernardino Base and Meridian, in the County of San Diego, State of California.

6. Plaintiff is informed and believes and thereon alleges that on or about January 2, 1990, Defendant TOM METZGER transferred by quitclaim deed the above-described property to Defendant KATHLEEN METZGER. On February 8, 1990, transfer of said real property was recorded as Document No. 90 072119, Image No. 51, Official Records in the Office of the County Recorder of San Diego County, California.

7. Plaintiff is informed and believes and thereon alleges that the transfer was made with an actual intent to

hinder, delay, or defraud Defendant TOM METZGER's creditors, including Plaintiff in the collection of his claims.

8. In exchange for the aforementioned transfer, Defendant TOM METZGER received nothing. At the time the transfer was made, the value of equity in the real property transferred was not less than $90,000.00. Thus, the Defendant TOM METZGER did not receive reasonably equivalent value in exchange for the real property.

9. Plaintiff is informed and believes and thereon alleges that the above-described property was received by Defendant KATHLEEN METZGER with knowledge that Defendant TOM METZGER intended to hinder, delay, or defraud the collection of Plaintiff's aforementioned claim. Defendant KATHLEEN METZGER had such knowledge by virtue of her confidential relationship with Co-Defendant TOM METZGER, her husband.

SECOND CAUSE OF ACTION
(CONSPIRACY)

10. Plaintiff refers to and incorporates herein Paragraphs 1 through 9, inclusive, of the First Cause of Action.

11. As alleged above, in or about January, 1990, Defendants TOM METZGER and KATHLEEN METZGER agreed and knowingly and willfully conspired between themselves to hinder, delay and defraud Plaintiff in the collection of his claim against Defendant TOM METZGER.

12. Under this conspiracy, the above-named Defendants agreed to transfer their property held in joint tenancy as husband and wife, to wife alone so that any judgment against Defendant husband could not be collected. This asset is the only substantial asset of Defendant TOM METZGER, leaving him insolvent in the face of Plaintiff's judgment. Defendant transferred his only substantial

assets within three weeks of being served with Plaintiff's complaint in the wrongful death action.

13. Defendants TOM METZGER and KATHLEEN METZGER did the acts and things herein alleged pursuant to, and in furtherance of, the conspiracy and agreement alleged above.

14. As a proximate result of the wrongful acts herein alleged, Plaintiff has suffered general damages and punitive damages should be awarded in an amount in excess of the jurisdictional minimum of this court.

15. At all times mentioned herein, Defendants KATHLEEN METZGER and TOM METZGER knew of Plaintiff's claim against TOM METZGER and knew that Plaintiff's claim could only be satisfied out of the real property transferred by TOM METZGER. Notwithstanding this knowledge, Defendants KATHLEEN METZGER and TOM METZGER intentionally, willfully, fraudulently, and maliciously did the things herein alleged to defraud and oppress Plaintiff. Plaintiff is therefore entitled to exemplary or punitive damages in an amount to be determined at trial.

WHEREFORE, Plaintiff prays judgment as follows:

ON THE FIRST CAUSE OF ACTION:

1. That the conveyance from Defendant TOM METZGER to Defendant KATHLEEN METZGER be set aside and declared void as to the Plaintiff herein to the extent necessary to satisfy Plaintiff's claim;

2. That Defendants KATHLEEN and TOM METZGER be restrained from disposing of the property conveyed until trial of this matter.

3. That a temporary restraining order be granted Plaintiff enjoining and restraining Defendants KATHLEEN and TOM METZGER and their representatives, attorneys, and agents from selling, transferring, conveying, encumbering or otherwise disposing of any of the

property transferred to KATHLEEN METZGER by TOM METZGER;

ON THE SECOND CAUSE OF ACTION AGAINST DEFENDANTS, AND EACH OF THEM, AS FOLLOWS:

4. For general damages in the sum in excess of the jurisdiction limit of this court;

5. For special damages in an amount to be proven at trial;

6. For exemplary or punitive damages in an amount to be determined at trial.

ON ALL CAUSES OF ACTION:

7. For costs of suit herein incurred; and

8. For such other and further relief as the court may deem proper.

DATED: 5-11-90

LAW OFFICES OF
JAMES E. MCELROY

By: /s/ James E. McElroy
JAMES E. MCELROY
Attorneys for Plaintiff

[Verification Omitted in Printing]

[Filed May 16, 1990]

SUPERIOR COURT OF THE STATE
OF CALIFORNIA IN AND FOR THE
COUNTY OF SAN DIEGO

Case No. 624088

ENGEDAW BERHANU, Personal Representative of the Estate of MULEGETA SERAW, Deceased,
Plaintiff,

v.

TOM METZGER, KATHLEEN METZGER, and DOES I through X, Inclusive,
Defendants.

ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER

[C.C.P. § 527]

On reading the Ex Parte Application of Plaintiff on file in the above-entitled action, the Declaration of James E. McElroy, and the Memorandum of Points and Authorities submitted therewith, and it appearing to the satisfaction of the court that this is a proper case for granting an order to show cause and a temporary restraining order, and that unless the temporary restraining order prayed for in the complaint be granted, great or irreparable injury will result to Plaintiff before the matter can be heard on notice.

IT IS HEREBY ORDERED that the above-named Defendants, and each of them, appear in Department 35 of this court, located at 220 W. Broadway, San Diego, on June 14, 1990 at 9:00 a.m., or as soon thereafter as the matter may be heard, then and there to show cause, if any they have, why they, and each of them, and their agents,

servants, employees, and representative should not be enjoined and restrained during the pendency of this action from engaging in, committing, or performing, directly or indirectly, any and all of the following acts: selling, transferring, conveying, encumbering or otherwise disposing of the subject property as described in the Application.

IT IS FURTHER ORDERED that pending the hearing and determination of the Order To Show Cause, the above-named Defendants, and each of them, and their officers, agents, employees, representatives, and all persons acting in concert or participating with them, shall be and they are hereby restrained and enjoined from engaging in or performing, directly or indirectly, any and all of the following acts: selling, transferring, conveying, encumbering, or otherwise disposing of the subject property as described in the Application.

IT IS FURTHER ORDERED that copies of the Complaint and this Order To Show Cause And Temporary Restraining Order be served on Defendants, and each of them, not later than May 16, 1990. Oppo Served & Filed by 10:00 a.m. 6-6-90 (Fax permissible)-Reply Due 6-11-90.

Let the above Order issue on Plaintiff's filing a bond in the sum of $7,500.

/s/ Philip D. Sharp
PHILIP D. SHARP
Judge of the Superior Court

[Filed Jun. 14, 1990]

SUPERIOR COURT OF THE STATE
OF CALIFORNIA IN AND FOR THE
COUNTY OF SAN DIEGO

Case No. 624088

ENGEDAW BERHANU, Personal Representative of the Estate of MULEGETA SERAW, Deceased,
Plaintiff,

v.

TOM METZGER, KATHLEEN METZGER, and DOES I through X, Inclusive,
Defendants.

STIPULATION AND ORDER
RE: INJUNCTION AND RESTRAINING ORDER

IT IS HEREBY STIPULATED by and between the parties, and ordered by this Court, that Defendants TOM METZGER and KATHLEEN METZGER, and each of them, their officers, agents, employees, representatives, and all persons acting in concert or participating with them, shall be and they are hereby restrained and enjoined from engaging in or performing, directly or indirectly, any and all of the following acts: selling, transferring, conveying, encumbering or otherwise disposing of the subject property commonly known as 308 Sunbeam Lane, Fallbrook, California and more particularly described as follows:

> The North 77.50 feet of the South 495 feet of the East 128 feet of the West 328 feet of the Northeast Quarter of Section 25, Township 9 South Range 4 West, San Bernardino Base and Meridian, in the County of San Diego, State of California.

This Order shall remain in effect until sixty days after final judgment is entered in the Oregon case of *Berhanu v. Metzger, et al*, No. A 8911-07007 (Cir.Ct., Multnomah County, Oregon).

Bond of $7,500.00 to continue in favor of TOM METZGER and KATHLEEN METZGER.

TOM METZGER and KATHLEEN METZGER have read this Stipulation and Order, understand the terms, agree to abide by said terms and acknowledge receipt of two copies of the Stipulation and Order. This Stipulation was voluntarily entered into and negotiated between the parties.

TOM METZGER and KATHLEEN METZGER understand that violation of this Order may constitute contempt of court and result in punishment or penalties imposed against them by this Court.

Dated: June 8th, 1990 /s/ Tom Metzger
TOM METZGER

Dated: June 8th, 1990 /s/ Kathleen Metzger
KATHLEEN METZGER

Dated: June 11, 1990 /s/ James E. McElroy
JAMES E. MCELROY
Attorney for Plaintiff,
ENGEDAW BERHANU

IT IS SO ORDERED

Dated: June 14, 1990 /s/ Thomas S. Leroy
THOMAS S. LEROY
Judge of the Superior Court

[Notary Omitted in Printing]

[Filed Oct. 15, 1990]

SUPERIOR COURT OF THE STATE
OF CALIFORNIA IN AND FOR THE
COUNTY OF SAN DIEGO

Case No. 624088

ENGEDAW BERHANU, Personal Representative of the Estate of MULEGETA SERAW, Deceased,
Plaintiff,

v.

TOM METZGER, KATHLEEN METZGER, and DOES I through X, Inclusive,
Defendants.

STIPULATION FOR ENTRY OF JUDGMENT

IT IS HEREBY STIPULATED by and between Plaintiff ENGEDAW BERHANU and Defendants TOM METZGER and KATHLEEN METZGER, by and through themselves and their respective counsel, that judgment in the above entitled case be entered in favor of Plaintiff and against Defendants as follows:

1. That Defendant KATHLEEN METZGER convey by way of quitclaim deed to THOMAS L. METZGER and KATHLEEN E. METZGER as joint tenants, the subject property commonly known as 308 Sunbeam Lane, Fallbrook, California, and more particularly described as follows:

> The North 77.50 feet of the South 495 feet of the East 128 feet of the West 328 feet of the Northeast Quarter of Section 25, Township 9 South Range 4 West, San Bernardino Basin Meridian in the County of San Diego, State of California.

2. That Defendants THOMAS L. METZGER and KATHLEEN E. METZGER, and each of them, their officers, agents, employees, representatives, and all persons acting in concert or participating with them, shall be and are hereby restrained and enjoined from engaging in or performing, directly or indirectly, any and all of the following acts: selling, transferring, conveying, encumbering, or otherwise disposing of the subject property commonly known as 308 Sunbeam Lane, Fallbrook, California and more particularly described as in Section 1 above.

3. That said restrictions imposed on Defendants THOMAS L. METZGER and KATHLEEN E. METZGER regarding this subject property located at 308 Sunbeam Lane, Fallbrook, California shall remain in effect only until 60 days after final judgment is entered in the Oregon case of *Berhanu v. Metzger, et al.*, #A8911-07007 (Cir.Ct., Multnomah County, Oregon).

4. That each party shall bear his/her own costs, disbursements and attorneys' fees.

Dated: 10-6-90

/s/ Tom Metzger
TOM METZGER
Defendant

Dated: 10-6-90

/s/ Kathleen Metzger
KATHLEEN METZGER
Defendant

Dated: 10-15-90

/s/ James E. McElroy
JAMES E. McELROY
Attorney for Plaintiff,
ENGEDAW BERHANU

[Filed Oct. 29, 1990]

SUPERIOR COURT OF THE STATE
OF CALIFORNIA IN AND FOR THE
COUNTY OF SAN DIEGO

Case No. 624088

ENGEDAW BERHANU, Personal Representative of the Estate of MULEGETA SERAW, Deceased,
Plaintiff,

v.

TOM METZGER, KATHLEEN METZGER, and DOES I through X, Inclusive,
Defendants.

JUDGMENT ON STIPULATION FOR ENTRY OF JUDGMENT

[Entered Oct. 30, 1990]

In the above entitled case, Plaintiff ENGEDAW BERHANU and Defendants TOM METZGER and KATHLEEN METZGER, have stipulated by and through themselves and their respective counsel, that judgment be entered in favor of Plaintiff and against Defendants as follows:

1. That Defendant KATHLEEN METZGER convey by way of quitclaim deed to THOMAS L. METZGER and KATHLEEN E. METZGER as joint tenants, the subject property commonly known as 308 Sunbeam Lane, Fallbrook, California, and more particularly described as follows:

> The North 77.50 feet of the South 495 feet of the East 128 feet of the West 328 feet of the Northeast Quarter of Section 25, Township 9 South Range 4

West, San Bernardino Basin Meridian in the County of San Diego, State of California.

2. That Defendants THOMAS L. METZGER and KATHLEEN E. METZGER, and each of them, their officers, agents, employees, representatives, and all persons acting in concert or participating with them, shall be and are hereby restrained and enjoined from engaging in or performing, directly or indirectly, any and all of the following acts: selling, transferring, conveying, encumbering, or otherwise disposing of the subject property commonly known as 308 Sunbeam Lane, Fallbrook, California and more particularly described as in Section 1 above.

3. That said restrictions imposed on Defendants THOMAS L. METZGER and KATHLEEN E. METZGER regarding the subject property located at 308 Sunbeam Lane, Fallbrook, California shall remain in effect only until 60 days after final judgment is entered in the Oregon case of *Berhanu v. Metzger, et al.*, #A8911-07007 (Cir.Ct., Multnomah County, Oregon).

4. That each party shall bear his/her own costs, disbursements and attorneys' fees.

IT IS HEREBY ADJUDGED, ORDERED, AND DECREED that Plaintiff ENGEDAW BERHANU have judgment entered against Defendants TOM METZGER and KATHLEEN METZGER pursuant to the terms as set forth above and that each party shall bear his/her own costs, disbursements and attorneys' fees.

DATE Oct. 29, 1990 /s/ Judith McConnell
JUDITH MCCONNELL
Judge of the Superior Court